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In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

HORACIO RAMOS MIRANDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service may be equitably estopped from denying permanent resident status to an alien who is statutorily ineligible for such status, on the ground that the Service did not act upon a visa petition filed by the alien's former wife in the 18-month period between the time that the petition was filed and withdrawn.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-3a) is reported at 673 F.2d 1105. An earlier opinion of the court of appeals (App. B, *infra*, 4a-5a) is reported at 638 F.2d 83. The opinions of the Board of Immigration Appeals (App. D, *infra*, 7a-11a) and the Immigration Court (App. E, *infra*, 12a-14a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 106(a)(4) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(4), provides in pertinent part:

> [T]he petition [for judicial review of orders of deportation] shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive * * *.

Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. 1255(a), provides in pertinent part:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 C.F.R. 245.1(d) provides in pertinent part:

> Any * * * applicant who claims immediate relative status under section 201(b) * * * of the Act is not eligible for the benefits of section 245 of the Act unless he/she is the beneficiary of a valid unexpired visa petition filed in accordance with Part 204 of this chapter and approved to accord him/her such status.

8 C.F.R. 245.2(a)(2) provides in pertinent part:

> Before an application for adjustment of status under section 245 of the Act may be considered properly filed, a visa must be immediately available. If a visa would be immediately available only upon approval of a visa petition, the application will not be con-

sidered properly filed unless such petition has first been approved. If a visa petition is submitted simultaneously with the adjustment application, the adjustment application shall be retained for processing only if approval of the petition when reached for adjudication would make a visa immediately available at the time of filing of the adjustment application.

STATEMENT

1. Respondent Horacio Ramos Miranda, a citizen of the Philippines, entered the United States on July 23, 1971, as a visitor for pleasure with authority to remain until December 1, 1971 (App. E, *infra*, 12a-13a). On May 27, 1976, Linda Milligan, a citizen of the United States, signed a visa petition in which she named respondent as an alien beneficiary and requested that he be granted an immigrant visa as her spouse, pursuant to their marriage on May 26, 1976 (R. 76, 76-A).[1] See 8 U.S.C. 1151(a) and (b). The visa petition signed by Milligan, which (if approved) would qualify respondent as a person to whom "an immigrant visa is immediately available * * *" (8 U.S.C. 1255(a)(3)), together with respondent's separate application for adjustment of status to that of permanent resident alien, were filed with the Immigration and Naturalization Service on June 10, 1976 (R. 66, 66-B, 76). Respondent stated in his application for adjustment of status that he had been employed continuously in the United States since October 1971 and that he previously had been married to Josefina Lazatin from September 1971 to April 1972 (R. 70-72).

2. On December 5, 1977, prior to the Service's adjudication of the visa petition, Milligan withdrew the

[1] "R." refers to the certified administrative record in the court of appeals, a copy of which has been lodged with the Clerk of the Court.

petition and explicitly "waive[d] any right to appeal" (R. 75). Shortly thereafter, the Service's District Director denied respondent's application for adjustment of status on the ground of statutory ineligibility because no immigrant visa was "immediately available" to him. The District Director noted that respondent's application was no longer supported by the visa petition that Milligan had filed on his behalf, that there was nothing in the record to suggest that respondent was entitled to any other immigrant classification, and that respondent had "not established that an immigrant visa [was] immediately available" to him (R. 78). Respondent did not seek review of this order.

3. The Service subsequently issued an order to show cause why respondent should not be deported as an "overstayed" visitor. See 8 U.S.C. 1251(a)(2). At deportation hearings conducted in March 1978 (R. 20-38), respondent conceded deportability but renewed his application for permanent resident status, relying solely on his prior marriage to Milligan (R. 27-31). In support of his application, respondent presented no evidence except for two documents, Milligan's petition for dissolution of the marriage and a court order requiring respondent to pay spousal support,[2] both of which he offered to show the bona fides of his former marriage (R. 29-31, 50-53). Although the immigration judge questioned the relevance of the bona fides of respondent's former marriage, respondent simply stated "[t]hat is my offer of proof. I submit that is relevant" (R. 31).

The immigration judge ruled that respondent's argument and offer of proof were irrelevant inasmuch as no

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[2] Respondent was required to pay $300 each month for the first three months, $200 each month for the following three months, and $1 each month thereafter (R. 52-53).

approved visa petition was pending and no "continuing relationship [was] contemplated by either party" to the marriage (R. 30-31). In a written opinion, the immigration judge subsequently denied respondent's renewed application for adjustment of status on the ground that he was no longer eligible for such relief under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, and 8 C.F.R. 245.1(d), due to Milligan's withdrawal of the visa petition that she previously had filed on his behalf (App. E, *infra*, 13a). The immigration judge also denied respondent's request for voluntary departure "as a matter of administrative discretion" (*id.* at 14a).[3]

4. On appeal to the Board of Immigration Appeals, respondent argued for the first time (see R. 12) that the Service should be equitably estopped from denying his renewed application for adjustment of status because of

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[3] In support of his request for voluntary departure, respondent submitted evidence showing that he had been arrested in April 1977 (R. 62-64) and that he had pleaded guilty on June 23, 1977, to one count of defrauding the Pacific Telephone Company, in violation of § 502.7(b)(1) of the California Penal Code (West 1970) (App. E, *infra*, 13a). Sentence was suspended, and respondent was placed on summary probation for one year on the condition that he violate no law and make restitution in the amount of $3,547.72 (R. 62-64). On March 31, 1978, after respondent had made full restitution, he was permitted to withdraw his plea, and the conviction was set aside under § 1203 of the California Penal Code (West 1970) (App. D, *infra*, 8a-9a; App. E, *infra*, 13a).

The immigration judge denied voluntary departure "based upon the balancing of factors, both favorable and unfavorable. There is no indication that the respondent has close family ties in the United States. His marriage to a United States citizen is at an end. The recency of his conviction for a crime involving moral turpitude is a sufficient adverse factor without counterbalancing favorable factors for me to deny his application as a matter of administrative discretion" (App. E, *infra*, 14a).

its "unreasonable delay" in acting on his original application during the 18 months preceding the breakup of his marriage to Milligan (R. 42-45). In respondent's view, "18 months was more than a reasonable time for the government to have acted on the petition and the application for permanent residence" (R. 42). Without citing any authority, respondent also asked that the Board take administrative notice of the Service's alleged "policy" of scheduling cases similar to his "for combined hearing and adjudication in less than three months" *(ibid.)*. Respondent stated (R. 44):

> The visa petition and the 245 application should have been approved in that 18 months period of time and a failure to act was not only unreasonable, unfair and unjust but also an abuse of governmental process if the delay was deliberate. The question can only be asked as to why there was such a long delay on the part of the government to take any action on the pending petition and 245 application.

The Service challenged respondent's estoppel argument on several grounds. First, the Service noted (R. 11) that the delay was due not to the time required for processing respondent's adjustment of status application, but to the time required for investigating the immediate relative visa petition filed by Milligan, upon which the adjustment application rested. Because respondent did not file the visa petition, but was merely the beneficiary of it, the Service asserted that he had no statutory right to contest this alleged delay.

Second, the Service contended (R. 11), as a jurisdictional matter, that the administrative decision of the District Director with respect to a visa petition is not reviewable by an immigration judge or the Board of Immigration Appeals in a deportation proceeding. Although the citizen who has filed the petition may appeal an adverse decision to the Board of Immigration Appeals

(see 8 C.F.R. 3.1(b)(5)), the only recourse available to an aggrieved alien beneficiary is the district court (R. 11-13). In this case, however, respondent did not complain of undue delay at the time of the District Director's action, and he did not seek review of either the District Director's denial of Milligan's visa petition or the denial of his original application for adjustment of status (see R. 12). Moreover, even at the hearing on his renewed adjustment application, respondent did not complain of any delay. Thus, he neither elicited nor proferred any evidence to show that there was an undue investigative delay, whether any such delay was intentional, what the length of any intentional delay was, or who was responsible (R. 12-13).

Finally, the Service argued (R. 12-13) that, in any event, respondent's estoppel claim lacked any factual basis. The Service asserted that, although the matter was not relevant to review of the order of deportation, the Service was "more than prepared to establish both that the investigative delay was excusable and that the respondent was not residing in a bona fide marital union with [Milligan] during the entire eighteen month period over which the respondent alleges he was eligible for adjustment of status" (R. 13).[4]

Based on the record established at the deportation hearing, the Board affirmed the immigration judge's denial of respondent's adjustment application because of "his statutory ineligibility for such relief" (App. D, *infra*, 10a). Moreover, notwithstanding the jurisdictional and

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[4] In his reply brief, respondent failed to answer any of the legal arguments advanced by the Service, but asked that the Board "not consider [the Service's] *out of record* statements" (R. 9; emphasis in original) with respect to the sham character of his marriage to Milligan.

procedural infirmities of respondent's estoppel claim, the Board rejected that claim on the merits *(ibid.)*:

> [U]nder the facts of this case (where the denial of the visa petition resulted from its withdrawal by the respondent's wife followed by her filing a petition for divorce in a California Superior Court) we do not find a basis for any "equitable" estoppel even assuming Board jurisdiction to grant such relief. Moreover, we find no evidence of any "affirmative misconduct" by a Service officer regarding the denial of the visa petition.

5. Respondent appealed the Board's decision to the court of appeals. Although the administrative record was silent with respect to the Service's investigation during the 18-month period preceding Milligan's withdrawal of the visa petition and the District Director's denial of respondent's adjustment application, and although the court of appeals recognized that "[t]he Board found no evidence of any 'affirmative misconduct' by a Service officer regarding the denial of the visa petition" (App. B, *infra*, 5a), the court reversed the Board's decision (*id.* at 4a-5a). The court of appeals held that "[t]he unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petition's withdrawal following the breakup of Miranda's marriage was affirmative misconduct by the INS" (*id.* at 15a). The court remanded the case "for consideration of Miranda's application for permanent residence under the circumstances as they existed at the time the INS should originally have acted" *(ibid.)*, with the additional requirement that "[t]he INS must, * * * in considering the [adjustment] application, treat the visa petition as if it were approved" *(ibid.)*.

6. This Court granted the government's petition for a writ of certiorari, vacated the judgment of the court of appeals and remanded the case for reconsideration in light of *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). 454

U.S. 808 (1981). On remand, the court of appeals adhered to its original decision (App. A, *infra*, 1a-3a), reiterating the finding on which that decision had rested: "[T]he unexplained failure of the INS to act on the visa petition for an eighteen-month period (after which Miranda's marriage broke up and the former Mrs. Miranda withdrew her visa petition) constitutes affirmative misconduct by the INS" (*id.* at 3a). The court distinguished *Hansen* on two grounds. First, respondent was seeking only "to be allowed to become a permanent resident, which entails no direct burden on public funds" (*id.* at 2a). Second, "the official misconduct [in *Hansen*] had not caused respondent to act or fail to act in a manner 'that [she] could not correct at any time.' 450 U.S. at 789 * * * [whereas here] the INS misconduct *did* inflict irrevocable damage on petitioner" (*ibid.*; emphasis in original). The court of appeals thus concluded that "the Supreme Court's conclusion that the government was not estopped in *Hansen* neither compels nor suggests the same conclusion here" *(ibid.)*. Accordingly, the court ordered the INS to reconsider respondent's application for permanent resident status "under the same circumstances that would have existed had the INS acted within a reasonable time after receiving the visa petition" *(ibid.)*.

REASONS FOR GRANTING THE PETITION

Respondent has remained unlawfully in the United States for more than a decade since the expiration of his nonimmigrant visitor's visa. By his own admission, he has worked throughout this period without authorization, and he has pleaded guilty to the commission of a crime. Nonetheless, the court of appeals has held that the Immigration and Naturalization Service is estopped from denying respondent permanent resident status, even though he is statutorily ineligible for that benefit because

no immigrant visa is immediately available to him. The sole basis for the court's ruling is the "unexplained failure of the INS to act on the visa petition [filed by his ex-wife and subsequently withdrawn] for an eighteen-month period" (App. A, *infra*, 3a). The holding that this factor constitutes "affirmative misconduct by the INS" warranting an estoppel against the government is without any legal basis and conflicts with numerous decisions of this Court.

Indeed, the decision below creates a novel principle of administrative law by applying a presumption of "affirmative government misconduct" whenever, in a court's view, the time spent in rendering a decision is "unreasonable" and the government has failed to account for the delay to the court's satisfaction. This approach is clearly inconsistent with the proper role of the courts in reviewing administrative action. As this Court recently noted in a related context, "[i]n taking this course, the Court of Appeals extended its 'writ beyond its proper scope * * *.'" *INS* v. *Wang*, 450 U.S. 139, 145 (1981).

1. Since the earliest days of the Nation, this Court has repeatedly and consistenly held that the government may not be equitably estopped from enforcing the laws even though private parties may, as a result, suffer hardship in particular cases. See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 367-369 (1813); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*,

366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Indeed, we are aware of no decision of this Court holding that an estoppel would or should lie against the government in any circumstance.

The Court most recently applied this principle in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). The question in that case was whether the Secretary of Health and Human Services was estopped from denying retroactive social security benefits to a person who would have been eligible for such benefits but for her failure to file a written application as required by statute. The applicant's failure resulted from her reliance on the erroneous advice of a government official, who also neglected to comply with the procedures recommended by the agency's Claims Manual. The court of appeals held that the "misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel." *Hansen* v. *Harris*, 619 F.2d 942, 948 (2d Cir. 1980). This Court reversed, noting (*Schweiker* v. *Hansen*, *supra*, 450 U.S. at 788) that it "has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations * * *." The Court also noted *(ibid.)* that, "[i]n two cases involving denial of citizenship, the Court has declined to decide whether even 'affirmative misconduct' would estop the Government from denying citizenship, for in neither case was 'affirmative misconduct' involved. *INS* v. *Hibi*, *supra*, [414 U.S.] at 8-9; *Montana* v. *Kennedy*, *supra*, [366 U.S.] at 314-315."

The question whether, as a general matter, an estoppel will lie against the government in the extreme case of "affirmative misconduct" is likewise not presented here because respondent has made no such factual showing.

The mere passage of 18 months prior to the making of an administrative decision hardly demonstrates misconduct of any kind, much less "affirmative misconduct," and, in the absence of evidence to the contrary, it is to be assumed that such a delay is the result of the agency's obligation to investigate fully the matter presented to it for a decision. Indeed, in basing an estoppel merely on a presumption of "affirmative misconduct" arising from an unexplained delay, the court of appeals ignored a second fundamental and long-standing principle of administrative law. As the Court stated in *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926): "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[5] See also *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971).

The court of appeals' decision cannot be justified by the factual differences between this case and *Schweiker* v. *Hansen*, *supra*. While it is true that *Hansen* involved a claim for the payment of money, the Court recognized that the general rule precluding equitable estoppel

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[5] An estoppel based on a presumption of administrative misconduct is particularly inappropriate in the immigration area, given this Court's recognition that " 'over no conceivable subject is the legislative power of Congress more complete * * *.' " *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977), quoting *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). If Congress had wished to limit the amount of time that the Service may take in investigating a visa petition, or mandate the granting of immediate relative status if the investigation were continued beyond that time, Congress clearly could have done so. Congress has not done so, however, and it is beyond the province of the judiciary to impose such limitations or penalties. See *Steadman* v. *SEC*, 450 U.S. 91, 104 (1981); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

against the government also applies in the context of immigration decisions. 450 U.S. at 788. See *INS* v. *Hibi*, *supra*; *Montana* v. *Kennedy*, *supra*. More important, the Court's rationale for refusing to allow an estoppel in *Hansen* is equally applicable here: "A court is [not] authorized to overlook * * * any * * * valid requirement for the receipt of [government] benefits." 450 U.S. at 790. The court of appeals' suggestion that ordering the conferral of an immigration status leading to citizenship in circumstances not authorized by Congress is somehow less significant an intrusion by the judiciary than ordering the payment of monetary benefits to claimants not entitled to them belittles the importance of requiring strict compliance with the statutory prerequisites of the " 'priceless treasure' of citizenship." *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981).

Moreover, the court of appeals' conclusion that the INS engaged in "affirmative misconduct" in this case is flatly inconsistent with *Hansen*. The only "misconduct" alleged by respondent is delay—a failure to act on Milligan's visa petition within what the court of appeals deemed to be a reasonable time. But the record does not indicate either that respondent would have been entitled to the benefit he sought even if the INS had acted more expeditiously or that any delay was the fault of the INS.[6] In contrast, in *Hansen* the estoppel claim was based on affirmative action by a government official—the mistaken advice that Hansen was ineligible for benefits—and it was undisputed that Hansen would have been entitled to the benefits sought had she disregarded that advice and applied in writing for the benefits. 450 U.S. at 789-790. Nonethe-

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[6] The Service has consistently maintained that it is prepared to establish both that respondent's marriage to Milligan was a sham and that the period of investigation was reasonable. See R. 13.

less, the Court concluded that the government official's conduct " '[fell] far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with the valid regulation." *Id.* at 790, quoting *Montana* v. *Kennedy*, *supra*, 366 U.S. at 314.

The estoppel imposed by the court below is unwarranted for two further reasons. First, Congress provided for the granting of immediate relative status to alien relatives of American citizens, not for the benefit of aliens, but for the benefit of citizens. Thus, when Milligan voluntarily withdrew her visa petition, and a visa was therefore no longer "immediately available" to respondent, the explicit congressional policy articulated in Section 245(a) of the Act, 8 U.S.C. 1255(a), and the administrative policy of 8 C.F.R. 245.2(a)(2), each mandated denial of respondent's application for adjustment of status. Thus, quite apart from the special problem of estoppel against the government, estoppel was inappropriate here because respondent was not deprived of any benefit that Congress had conferred on him, as opposed to Milligan. Second, to give rise to an estoppel, government conduct must at least have caused the complaining party to take or fail to take some action that he cannot now correct. See *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 789. Respondent has failed to show any such harm here. Indeed, the duration of the government's investigation clearly benefited respondent by further extending his unlawful stay.[7] Furthermore, even if the Service had granted the visa petition prior to its withdrawal by Milli-

[7] In fact, the delay has resulted in the removal of one bar to respondent's eligibility for discretionary relief under Section 244(a) of the Act, 8 U.S.C. 1254(a), because he has now been "physically present in the United States for a continuous period of * * * seven years." In addition, as respondent noted in his brief in the court of

gan, that action would not ultimately have benefited respondent because the approval would have been revoked automatically (see 8 C.F.R. 205.1(a)(4)) once his divorce had come to light.[8]

Finally, as this Court has remarked, the government cannot be put " 'at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the [practical requirements] which experience has taught to be essential to the honest and effective administration of the [law].' " *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 789-790, quoting *Hansen* v. *Harris*, 619 F.2d 942, 956-957 (2d Cir. 1980) (Friendly, J., dissenting) (footnote omitted). The Court's reasoning applies with even greater force here, where the estoppel found by the court of appeals was premised not on an official's failure to follow instructions, but merely on the "unexplained" length of time that the government took to complete an investigation. Given the great potential for abuse in the area of immediate relative visa petitions filed by citizen spouses, there can be no doubt, as the Ninth Circuit has previously recognized, that careful investigations are essential. See *Pena-Urrutia* v. *INS*, 640 F.2d 242, 244 (9th Cir. 1981). See also 8 U.S.C. 1251(c); *INS* v. *Errico*, 385 U.S. 214 (1966) (sham marriage); *Lutwak* v. *United States*, 344 U.S. 604 (1953) (convictions relating to operation of sham

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appeals (Br. 11), he has also utilized the further delay occasioned by his appeal from the Board's decision to remarry his first wife, who is now a permanent resident alien (as a consequence of an intervening marriage) and who has filed a new visa petition on respondent's behalf under 8 U.S.C. 1153(a)(2).

[8] Even when an alien has actually received an adjustment of status, the adjustment may be rescinded within five years if "the person was not in fact eligible for such adjustment" (8 U.S.C. 1256(a)) because, for instance, he was a party to a sham marriage. See also 8 C.F.R. Part 246.

marriage business); *Alexandro* v. *United States*, 675 F.2d 34, 37-38 (2d Cir. 1982), petition for cert. pending, No. 81-2291 (scheme to arrange sham marriage); *United States* v. *Bithoney*, 631 F.2d 1, 4-5 (1st Cir. 1980), cert. denied, 449 U.S. 1083 (1981) (same); *Skelly* v. *INS*, 630 F.2d 1375, 1382 (10th Cir. 1980) (sham marriage). By requiring that immediate relative status be granted to an alien who is statutorily ineligible for that status, because of the Service's delay in acting on a visa petition, the decision below will necessitate incomplete scrutiny of many such petitions.[9]

2. In *INS* v. *Wang*, *supra*, the Court held that the Ninth Circuit had "extended its 'writ beyond its proper scope' " (450 U.S. at 145) by "improvidently encroach-[ing] on the authority which the [Immigration and Nationality] Act confers on the Attorney General and his

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[9] A staggering number of "immediate relative" visa petitions are filed each year. In 1976, for instance, the year in which Milligan filed her petition on behalf of respondent, some 206,319 such petitions were filed. *1976 Annual Report: Immigration and Naturalization Service* 11. The Service has noted *(ibid.)*:

> In dealing with these petitions, an inordinate amount of fraud, particularly in relation to claimed marriages, has been uncovered. Whole armies of "marriage arrangers" prey upon those aliens desperately seeking admission to this country. For a fee, partners are provided and marriages contracted to establish eligibility under the statutes for visa issuance benefits.

The haste that the court's ruling will require would be particularly damaging in the investigation of "immediate relative" petitions filed on behalf of spouses of American citizens. Not only are such petitions subject to substantial abuse, but the validity of a marriage often involves difficult factual and legal determinations. See 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.18a (1977).

delegates" (*id.* at 144). The same "improvident encroach-[ment]" exists here. The court below ignored respondent's failure to raise his claim in the proper forum at the proper time, as well as his failure to make any factual record in the immigration court concerning the allegedly improper investigatory delay. As in *Wang*, the court of appeals' failure to require that respondent's claim be properly raised and factually supported in the record would allow "many aliens [to] obtain a hearing based upon quite minimal showings" (*id.* at 145).

Moreover, the court of appeals disregarded the narrow scope of judicial review set forth in the Immigration and Nationality Act. In Section 106(a)(4) of the Act, 8 U.S.C. 1105a(a)(4), Congress specifically provided that the jurisdiction of the courts of appeals in deportation cases should be confined to a review "solely upon the administrative record * * * and * * * the findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." Although noting in its first decision that the Board "found no evidence of any 'affirmative misconduct' by a Service officer regarding the denial of the visa petition" (App. B, *infra*, 5a; see also App. A, *infra*, 2a), the court below nonetheless rejected the Board's finding, without any discussion of the question, by simply asserting that the "unexplained" 18-month investigative period constituted affirmative misconduct giving rise to an estoppel. [10] The court ordered that the case "be remanded

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[10] The Service's conduct during the 18-month period was "unexplained" to the court of appeals only because it was irrelevant to respondent's deportation proceedings. As noted above (see page 7, *supra*), however, the Service informed the Board that it was prepared to explain the length of the investigation. At the least, the court of appeals should have remanded to the Board for this purpose.

for consideration of [respondent's] application for permanent resident status under the same circumstances that would have existed had the INS acted within a reasonable time after receiving the visa petition" (App. A, *infra*, 3a). The court of appeals gave no guidance on what it would consider a "reasonable time," and, inasmuch as respondent never attempted to show that any part of the time spent by the Service in completing its investigation was unjustified, the court of appeals had no basis for determining that the delay was unreasonable.

The effect of the court's order is not totally clear. It is uncertain whether the Service is now free to conclude that it would have denied the visa application within a "reasonable time" based on the evidence that it has developed (but that was legally irrelevant prior to the decision below), showing that respondent's marriage was a sham from the outset. Likewise, it is uncertain whether the Service is precluded from considering the application for permanent resident status as if a visa had been issued and then revoked under 8 C.F.R. 205.1(a)(4). See page 15, *supra*.[11] If the court's opinion means that the Service is forever estopped from questioning the bona fides of respondent's former marriage, and if the Service is now required to grant respondent an irrevocable special status as the beneficiary of a fictitious immediate relative

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[11] In its first decision, to which the court of appeals "adhered" on remand, the court stated that the INS must consider the permanent residence application "under the circumstances as they existed at the time the INS should originally have acted" and "treat the visa petition as if it were approved" (App. B, *infra*, 5a). On remand, the court stated that the INS must consider the permanent residence application "under the same circumstances that would have existed had the INS acted within a reasonable time after receiving the visa petition" (App. A, *infra*, 3a). The court did not explain the significance, if any, of this change.

visa petition, it is all the more clear that the Ninth Circuit has "improvidently encroached on the authority which the Act confers on the Attorney General and his delegates." *INS* v. *Wang*, *supra*, 450 U.S. at 144.

3. The estoppel issue presented by this case is important. Many federal agencies are required to conduct investigations in the course of exercising their responsibility for the administration of various government benefits programs. Delay in some of these investigations is inevitable, and nothing in the court of appeals' opinion suggests that its estoppel theory is limited to the INS. Moreover, the court's holding is significant even in the particular context involved here. In 1976, the year in which Milligan's visa petition was filed, the Service received more than 206,000 "immediate relative" petitions. See page 16 and note 9, *supra*. The haste imposed upon the INS by the holding below will certainly impede the effectiveness of the Service's effort to enforce the immigration laws fairly with respect to all persons seeking entry to this country. See *INS* v. *Wang*, *supra*, 450 U.S. at 145. The adverse effect of this holding is particularly significant, of course, in light of the extremely large share of immigration cases that are adjudicated in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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